United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

No. 74-2663

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

ROBERT C. MERCKENS,

Plaintiff-Appellant,

-against-

F.I. duPONT, GLORE FORGAN & CO.,

Defendant-Appellee.

APPELLEE'S BRIEF

Weil, Gotshal & Manges
Attorneys for Defendant-
Appellee
767 Fifth Avenue
New York, New York 10022
(212) 758-7800

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF CONTENTS

No. 74-2663

UNITED STATES DISTRICT COURT
SECOND CIRCUIT

----------x

ROBERT C. MERCKENS, :

Plaintiff-Appellant, :

-against- :

F.I. duPONT, GLORE FORGAN & CO., :

Defendant-Appellant. :

----------x

PRELIMINARY STATEMENT

This brief is submitted on behalf of defendant F.I. duPont, Glore Forgan & Co. ("FIDGF") in opposition to plaintiff's appeal from the Judgment of this Court, based on the decision of the Honorable Lloyd F. MacMahon granting defendant summary judgment. The decision below is reported unofficially at ¶94,868 of the CCH Federal Securities Law Reporter, Current Binder.

ISSUES PRESENTED FOR REVIEW

1. Whether this action is barred by the applicable statutes of limitation. The Court below correctly answered in the affirmative.

2. Whether the Court has personal jurisdiction over the defendant. The Court below did not reach this question.

STATEMENT OF THE CASE

This action was commenced by the filing of the summons and complaint on April 8, 1974. The summons and complaint were served on April 29, 1974 on an employee of duPont Glore Forgan Incorporated ("DGF Inc."), an entity unrelated to defendant. Defendant answered on May 20, 1974.* Contrary to plaintiff's claim, made for the first time on this appeal, that the complaint alleges fraud, the complaint on its face charges only a violation of Regulation T (12 C.F.R. §220) issued by the Board of Governors of the Federal Reserve System pursuant to Section 7 of the Securities Exchange Act of 1934 (the "'34 Act").

---

* In its Answer, defendant raised as Affirmative Defenses the statute of limitations and lack of personal jurisdiction.

On August 16, 1974, defendant moved for summary judgment based upon the affidavits of Milton A. Speicher and David B. Bliss. Two grounds were submitted in support of this motion: (1) that the action was barred by the applicable statute of limitations and (2) that the Court lacked jurisdiction over defendant. Plaintiff submitted no answering brief or affidavits. Rather, on Spetember 3, 1974, plaintiff filed what was denominated a "Statement Pursuant to General Rule 9(g)".

In an Opinion dated November 8, 1974, and filed on November 11, 1974, defendant's motion was granted on the ground that the action was barred by the statute of limitations. Judgment was entered on November 12, 1974.

Plaintiff's Notice of Appeal was filed on December 12, 1974. Plaintiff is proceeding in forma pauperis.

STATEMENT OF FACTS

The complaint in this action alleges a violation of Regulation T. Specifically, plaintiff alleges that he sold short 100 shares of the common stock of Walt Disney Corp. in November, 1970, through FIDGF* and that, in

---

* The transaction is alleged to have been effected through FIDGF's Lausanne, Switzerland office, although the complaint alleges that plaintiff resides in New York.

connection with that short sale, defendant overextended credit to plaintiff by failing to require him to deposit sufficient funds in his account or to liquidate the transaction in order to comply with the applicable margin regulations.

On this Appeal, plaintiff now claims that he has also charged defendant with a violation of Section 10(b) of the '34 Act and Rule 10b-5 promulgated thereunder. However, it is clear from reading the complaint -- which is the only document setting forth plaintiff's claims properly before this Court -- that the only "fraud" allegedly committed by FIDGF was in allowing a violation of Regulation T and thereafter denying that there was such a violation. Only Regulation T is mentioned in the complaint. Clearly, plaintiff's claim that fraud was committed was added solely in a belated attempt to make this action appear timely.

Although the complaint is somewhat unclear as to the precise nature of plaintiff's allegations, it appears that plaintiff is contending that Regulation T was violated in November of 1970 when FIDGF refrained from liquidating his position in Walt Disney Corp. stock when payment therefore was not made in the time required by Regulation T*. Plaintiff claims that FIDGF, some six months later, liquidated another position in order to retroactively satisfy the margin requirements.** Further, plaintiff charges that defendant has committed fraud by virtue of its denial of these allegations.

As set forth in the affidavit of Milton A. Speicher,*** defendant FIDGF is a New York limited partnership, currently in liquidation, with its offices at 39 Broadway, New York, New York (¶¶1, 4). However, plaintiff has never caused the summons and complaint to be served

---

* Either five or seven days, depending on what type of account plaintiff maintained (which plaintiff fails to allege). Compare 12 C.F.R. §220.3(b) with 12 C.F.R. §220.4(c)(2).

** It is FIDGF's position that, as a matter of fact, the transaction at issue was made in full compliance with all applicable margin regulations. However, it is not necessary for purposes of this Appeal to discuss the underlying merits of plaintiff's alleged claim.

*** Since plaintiff is proceeding in forma pauperis, no Appendix has been filed. Accordingly, all citations are to the full Record of this case.

on FIDGF (Speicher Aff. ¶2); rather, the summons and complaint were delivered to an employee in the legal department of DGF Inc. at 77 Water Street, New York, New York (Affidavit of David B. Bliss, Esq. ¶2), on April 29, 1974.

This purported service on FIDGF by delivery to DGF Inc. is patently insufficient. As is made abundantly clear in the Speicher and Bliss affidavits, and contrary to plaintiff's unsupported claims, FIDGF is not in any way related to DGF Inc. (Speicher Aff. ¶4; Bliss Aff. ¶¶4-5). Nor is FIDGF "also known as" duPont Walston Incorporated ("Walston"), contrary to the claim in the caption of all papers filed by plaintiff. There has never been any combination of the business of Walston and FIDGF, or any other transaction of such a nature, by virtue of which Walston and FIDGF could have become the same entity. (See Speicher Aff. ¶6; Bliss Aff. ¶¶4, 6).*

---

* Even if service on Walston was deemed to be service on FIDGF, there has been no proper service here since the person to whom the summons and complaint were delivered was not a Walston employee (Bliss Aff. ¶1).

ARGUMENT

POINT I

THIS ACTION IS BARRED BY THE STATUTE OF LIMITATIONS

As has been noted, this action charges a violation of Regulation T by FIDGF in that it overextended credit to plaintiff in connection with his short sale of Walt Disney stock in November, 1970. A violation of Section 7(c) of the '34 Act and, hence, of Regulation T occurs and a cause of action for such violation accrues when the broker fails to secure cash payment for the transaction, or, that failing, to liquidate the transaction within the time allowed by Regulation T. Pearlstein v. Scudder & German, 429 F.2d 1136 (2d Cir. 1970). Here, according to the complaint, the transaction occurred in November, 1970. The filing of the summons and complaint in this action took place in April, 1974, well over three years after the alleged violation.

Since there is no express cause of action for a violation of Section 7(c) of the '34 Act, the courts have, as in the cases under other sections of the Federal Securities acts where they have implied private causes of

action,* looked elsewhere for the applicable period of limitations. See Gammage v. Roberts, Scott & Co., CCH Fed.Sec.L. Rep. ¶94,760 (S.D. Cal. 1974). Here, the only possible applicable periods are found either in the '34 Act itself (§§18(c) or 29(b)) or in state law. The only decisions in this Circuit to consider which limitations period applied held that the state law period of limitations for claims most similar to a claim for a violation of Regulation T should be applied. Klein v. Bower, CCH Fed.Sec.L.Rep. ¶92,361 (S.D.N.Y. 1969), aff'd., 421 F.2d 338 (2d Cir. 1970); Hornblower & Weeks-Hemphill, Noyes v. Burchfield, 366 F.Supp. 1364 (S.D.N.Y. 1973). In Klein, Judge Tyler held that the applicable New York State period of limitations was that provided in Section 214(2) of the Civil Practice Law and Rules for actions based on violations of a duty created by statute.** Judge Tyler specifically held that the causes of action governed by that section were closer to a claim for a violation of Regulation T than

---

* E.g., J.I. Case Co. v. Borak, 377 U.S. 426 (1964)

** See also Pearlstein v. Scudder & German, CCH Fed.Sec.L. Rep. ¶93,521 at p.92,510 (S.D.N.Y. 1972).

were any other causes of action under New York law. Similarly, Judge Lasker, in the Hornblower case, held that Section 214(2) was applicable (366 F.Supp. at 1367) because it was the most analogous claim.*

Section 214(2) provides that any claim for the violation of a statutory duty must be brought within three (3) years from the accrual of the cause of action. Hence, the statute of limitations here ran out in November of 1973 - months before this action was commenced.

Moreover, even if the limitations period set forth in the '34 Act were to be applied -- as it was in Goldenberg v. Bache & Co., 270 F.2d 675 (5th Cir. 1959) -- this action would still be time-barred. Both Sections 18(c) and 29(b) of the '34 Act provide that actions must be commenced either one year from discovery or three years from the violation, whichever is shorter.

In an attempt to avoid the appropriate statute of limitations, plaintiff has belatedly claimed that this action alleges fraud and a violation of Section 10(b) of

---

* In Gammage v. Roberts, Scott & Co., supra, the Court held that the equivalent California statute of limitations applied.

the '34 Act and Rule 10b-5 promulgated thereunder.* However, a reading of the Complaint demonstrates that the "fraud" plaintiff now claims that FIDGF is guilty of was allegedly committed by allowing a violation of Regulation T and then denying that there was such a violation. Here, as in Klein v. Bower, supra, this attempt to change a Regulation T claim into a fraud claim in order to extend the statute of limitations is improper. The Complaint is utterly devoid of any allegation of a violation of Section 10(b) or Rule 10b-5. Clearly, plaintiff's attempt to change this action under Regulation T into a 10b-5 claim is improper and, accordingly, reliance on the statute of limitations for that section is misplaced in this action.

---

* However, this claim was not made in any paper before the District Court since plaintiff chose, in contravention of Rules 56(c) and (e) of the Federal Rules of Civil Procedure, not to submit any answering affidavits. Accordingly, this belated claim is not cognizable in this Court. See Calhoun v. Freeman, 316 F.2d 386 (D.C. Cir. 1963)

POINT II

SUMMARY JUDGMENT SHOULD BE GRANTED BASED ON THE LACK OF PERSONAL JURISDICTION OVER FIDGF.*

Rule 4 of the Federal Rules of Civil Procedure provides the methods of properly serving a summons and complaint on a party. Absent such proper service, the court lacks personal jurisdiction over the defendant. 2 Moore's Federal Practice, ¶4.02[1] at p.947.

Ordinarily, under Rule 4(d)(3), a partnership such as FIDGF may be served by delivery of the summons and complaint to a partner or other general agent of the partnership. See 2 Moore's Federal Practice, supra, ¶4.24. Here,however, FIDGF itself has never been served (Speicher

---

* A second ground for defendant's motion for summary judgment -- the Court's lack of personal jurisdiction -- was argued below. Although Judge MacMahon did not find it necessary to reach this question in his decision, it is appropriate for this Court to consider that issue. Jaffke v. Dunhorn, 352 U.S. 280, 281 (1957); Kithcart v. Metropolitan Life Ins. Co., 150 F.2d 997, 1000-01 (8th Cir.); Cert. denied, 326 U.S. 777; rehearing denied, 326 U.S. 812; 327 U.S. 813 (1945); Lum Wan v. Esperdy, 321 F.2d 123 (2d Cir. 1963).

Aff. ¶2). Rather, at plaintiff's direction (Bliss Aff. ¶3), the summons and complaint were delivered to an employee of DGF Inc., who expressly advised plaintiff that the attempted service was improper (Bliss Aff. ¶3).

Plaintiff apparently seeks to rectify the impropriety of the alleged service on FIDGF by delivery of the summons and complaint to other persons or entities by claiming that FIDGF is "also known as" Walston and that FIDGF is the same entity as DGF Inc.* However, as is made eminently clear by the Speicher and Bliss affidavits and the Exhibits annexed thereto, plaintiff's claims are entirely without basis in fact or law.

First, FIDGF is not, and never has been, "also known as" Walston. FIDGF and Walston are entirely separate and unrelated entities which have never entered into any combination of their businesses (Speicher Aff. ¶6; Bliss Aff. ¶¶4, 6). Moreover, even if, contrary to the true facts, service on Walston could somehow be seen as good

---

* This last claim is made for the first time in an unsigned, undated and unsworn document, denominated an "Affidavit".

service on FIDGF, since the summons and complaint were not delivered to any of the persons referred to in Rule 4(d)(3) as being appropriate recipients, service was patently improper here. The only person to whom the summons and complaint were delivered was an employee of neither FIDGF nor of Walston (Bliss Aff. ¶¶1-3).

Second, plaintiff's assertion that FIDGF and DGF Inc. are the same entity is also contrary to the sworn facts. Both FIDGF and DGF Inc. maintain separate offices and have separate management (Speicher Aff. ¶4; Bliss Aff. ¶4). The fact that DGF Inc. acquired substantially all of FIDGF's assets in exchange for the assumption of certain of its liabilities* does not make them the "same" entity. Indeed, Judge William M. Byrne of the Central District of California granted summary judgment to DGF Inc. on this very question, holding that DGF Inc. was not a successor to FIDGF and that it was not the "same" entity. (Exhibit A to Bliss Aff.). The National Association of Securities Dealers has reached the same conclusion (Exhibit B to Bliss Aff.). No contrary authority exists (Bliss Aff. ¶5).

---

* Specifically excluding FIDGF's liability for violations of Federal law (Speicher aff'd ¶5)

Thus, as a matter of fact and law, FIDGF and DGF Inc. are not the same entity and delivery of the summons and complaint to a DGF Inc. employee does not constitute good service on FIDGF.

Plaintiff has failed to put in any sworn evidence to controvert FIDGF's position with respect to the propriety of the service of the summons and complaint. Accordingly, under Rule 56(e) of the Federal Rules of Civil Procedure, summary judgment for FIDGF on this issue should be granted. See SEC v. Spectrum, Ltd., 54 F.R.D. 70 (S.D.N.Y. 1971).

CONCLUSION

For the foregoing reasons, the decision below should be affirmed in all respects.

Dated: New York, New York
February 19, 1975

Respectfully submitted,

WEIL, GOTSHAL & MANGES
Attorneys for Defendant
F.I. DuPont, Glore Forgan
& Co.
767 Fifth Avenue
New York, New York 10022
(212) 758-7800

Of Counsel:
Neal Schwarzfeld

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

ROBERT C. MERCKENS,

Plaintiff-Appellant,

-against- : 74-2663

F.I. duPONT GLORE FORGAN & CO., : AFFIDAVIT

Defendant-Appellee.

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

LEONIE ALLEN, being duly sworn, deposes and says:

1. I am not a party to this action, am over 18 years of age and reside at 116-28 169th Street, Rochdale Village, Queens, New York.

1A

2. On February 19, 1975, I served three copies of the within Appellee's Brief upon Robert C. Merckens, plaintiff pro se, by depositing copies thereof, postage prepaid, in the United States mails addressed to Robert C. Merckens, P.O. Box 1173, New York, New York 10023, the address designated by plaintiff for that purpose.

Leonie Allen

Leonie Allen

Sworn to before me this
19th day of February, 1975.

Neal Schwarzfeld

Notary Public

NEIL A. SCHWARZFELD
Notary Public, State of New York
No. 31-8880965
Qualified in New York County
Commission Expires March 30, 1976

2A

NOTICE OF ENTRY

Sir :—Please take notice that the within is a (certified) true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.

WEIL, GOTSHAL & MANGES

Attorneys for

Office and Post Office Address

767 FIFTH AVENUE

Borough of Manhattan New York, N.Y. 10022

To

Attorney for

NOTICE OF SETTLEMENT

Sir :—Please take notice that

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.

WEIL, GOTSHAL & MANGES

Attorneys for

Office and Post Office Address

767 FIFTH AVENUE

Borough of Manhattan New York, N.Y. 10022

To

Attorney for

Index No. 74-2663 *Year* 19

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

ROBERT C. MERCKENS,

Plaintiff-Appellant,

-against-

F.I. duPONT GLORE FORGAN & CO.

Defendant-Appellee.

AFFIDAVIT

WEIL, GOTSHAL & MANGES

Attorneys for defendant-appellee

Office and Post Office Address, Telephone

767 FIFTH AVENUE

Borough of Manhattan New York, N.Y. 10022

PLAZA 8-7800

To

Attorney for

Service of a certified copy of the within

is hereby admitted.

Dated,

Attorney for

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

AFFIDAVIT OF JOSEPH S. GENSHLEA

I, JOSEPH S. GENSHLEA, state:

I am an attorney at law and one of the attorneys of record representing duPONT GLORE FORGAN INCORPORATED, a Delaware corporation, in an action in the United States District Court for the Eastern District of California entitled ARMAND MACCHIAVELLI, Plaintiff, vs. duPONT GLORE FORGAN INCORPORATED, a Delaware corporation, and DOES I through C, No. Civ. S2493 P.C.W.

On December 16, 1974, I caused to be filed in such action on behalf of duPONT GLORE FORGAN INCORPORATED (hereinafter "DGF Inc."), its motion for a partial summary judgment against plaintiff on all causes of action or claims which he was asserting therein based upon transactions or events occurring prior to May 14, 1971, the liability for which had not been contractually assumed by DGF Inc. The motion was denominated "partial" solely because it would only apply to those claims which were based upon transactions occuring before May 14, 1971 but not those thereafter. The motion was directed to plaintiff's Second Amended Complaint.

In such Complaint plaintiff alleges, in substance, that in the early part of 1970 he transferred an existing account to Glore Forgan, Wm. R. Staats, Inc., (hereinafter "Staats"). Such account was subsequently transferred to F. I. duPont, Glore Forgan & Co., (hereinafter "FIDGF"), a New York limited partnership. The plaintiff alleges that he maintained such account with "defendant", i.e. DGF Inc. until the account was transferred on September 17, 1971. The account thus covers a period which includes plaintiff's account with three different firms: Staats, FIDGF, and DGF Inc.

Plaintiff's Second Amended Complaint which was framed in three

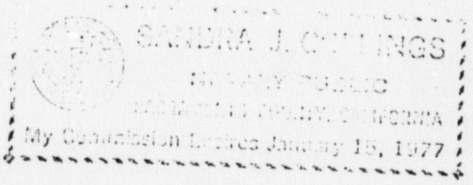
It was the defendant's position in its motion for partial summary judgment that it was not liable for any transactions or events which occurred prior to May 14, 1971, when it acquired substantially all of the assets and agreed to assume certain of the liabilities of FIDGF, which liabilities did not include those asserted by plaintiff as set forth above. This was based upon the terms of the Acquisition Agreement entered into between DGF Inc. and FIDGF. The motion was based upon the affidavits of Larry S. Glazer, President of DGF Inc., Mr. Edward J. Lill, a partner in the accounting firm of Haskins & Sells, and the affidavit of H. Ross Perot (submitted at the time of the argument of the motion).

The defendant's motion was argued by me on February 18, 1975, at which time Judge Philip C. Wilkins, United States District Judge for the Eastern District of California, orally granted the defendant's motion from the bench. The Judge observed that the acquisition seemed to be for a fair consideration and that no basis for liability in DGF Inc. for the transactions or events alleged by plaintiff, occuring prior to May 14, 1971, could be found from the facts before him. He directed that findings of facts and conclusions of law be prepared, with the judgment, and these documents are in the process of preparation at this time.

DATED: February 25, 1975.

Joseph S. Genshlea

Subscribed and sworn to before me
this 25th day of February, 1975.



Sandra J Collings
Notary Public